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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RAY CARLISLE, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

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Question Presented

Was Petitioner was Denied Due Process of Law and Equal Protection of the Laws When the Trial Court Failed to Instruct the Jury that A Violation of 31 U.S.C. §5324, "Willfully" Structuring a Monetary Transaction, Required Proof Beyond a Reasonable Doubt that Petitioner Voluntarily and Intentionally Violated a Known Legal Duty per this Court's Decision in *Cheek v. United States* (1991) __U.S.__, 111 S.Ct. 604?

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I.

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List of Parties (Rule 28.1)

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Petitioner RAY CARLISLE respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeal for the Ninth Circuit, rendered on June 22, 1992, and the order of the Court of Appeal for the Ninth Circuit, rendered on August 27, 1992, denying Petitioner's Petition for Rehearing.

Opinions Below

The opinion of the Court of Appeal for the Ninth Circuit in the above entitled case was an unpublished opinion rendered on June 22, 1992 and is reproduced in the Appendix hereto at A-1 through A-7. Petitioner's Petition for Rehearing was denied by the Court of Appeal for the Ninth Circuit on August 27, 1992.

Jurisdiction

This case comes before this Court following the judgment of the Court of Appeal for the Ninth Circuit June 22, 1992, affirming petitioner's conviction structuring a monetary transaction (31 U.S.C. §5322, 31 U.S.C. §5324(1), 31 U.S.C. §5324 (3)). The Court of Appeal for the Ninth Circuit denied a timely Petition for Rehearing on August 27, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes Invoked

31 U.S.C. §5313, 31 U.S.C. §5322, 31 U.S.C. §5324(1), 31 U.S.C. §5324 (3)

Statement of the Case

On April 11, 1990, the Grand Jury for the Northern District of California returned an indictment, charging petitioner Ray Carlisle and two others with currency regulation violations, to wit: Count One, conspiracy to violate 31 U.S.C. §5313 (a), 31 U.S.C. §5324(1) and 31 U.S.C. §5324(3) (Reporting and Structuring Transactions), and Count Two, a violation of 31 U.S.C. §5324(3) (Structuring Currency Transactions). On August 17, 1990 a jury returned a guilty verdict on both counts.

Petitioner was sentenced on November 9, 1991 as follows: Count One: One year in the custody of the Attorney General to be served at a halfway house; Count Two: Sentence suspended with petitioner placed on five years probation. Petitioner was also ordered to pay a fine in the amount of $3,500.00.

A Notice of Appeal was filed November 16, 1991. On June 22, 1992, the Court of Appeal for the Ninth Circuit affirmed petitioner's conviction. Petitioner's Petition for Rehearing was denied on August 27, 1992.

Statement of Facts

Petitioner is a real estate appraiser. He was prosecuted for allegedly participating in a scheme to

convert currency into a series of cashiers checks for the purpose of providing down payments on the purchase of two houses by the codefendants in this case. The checks were purchased by the government's principal witness, Curtis Randolph, a housing inspector employed by the City of Oakland, who was originally charged along with petitioner. He subsequently agreed to testify for the government and was allowed to plead guilty to a misdemeanor charge in return for testimony with the promise of no jail time.

Mr. Randolph testified that over the last eight to ten years, he occasionally packaged real estate loans for people by preparing the forms and presenting them to various lenders. According to Mr. Randolph, he himself never loaned money, "from [his] own person cash." (R.T. 240-241, 308) He told the jury that he had gone through bankruptcy proceedings in 1986 involving over $100,000.00 of debts. Mr. Randolph told the jury that some of the funds for the loans he had arranged came from financial institutions and some of it come from private sources. Typically, he would charge a fee for this service. (R.T. 310) He conceded that he had engaged in loan packaging for the years 1986-1987. (R.T. 311)

Mr. Randolph told the jury that he had known petitioner for almost twenty years and had been involved with approximately a half dozen other real estate transactions with him. According to Mr. Randolph, he became involved in the transaction in the following manner. Mr. Randolph testified that, a few days before he bought the checks, he was contacted by petitioner who asked him if he wanted to make some money. He went to petitioner's house where he was told by petitioner that there were two individuals buying houses who needed cashiers checks purchased and would he do it? Although he testified that he was not told how much money was involved, he agreed to do it, within a minute or two, when informed that there was three thousand dollars in it for him.[1] (R.T. 245, 381)

According to Mr. Randolph, petitioner told him that he was needed to purchase the checks because of the

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[1] Mr. Randolph admitted that he told Agent Fletcher on July 9, 1987 that he had met with Mr. Jackson and Mr. Powers at appellant's house to discuss the purchase of the cashier's checks, but that appellant was not in the room. "I couldn't just of out and buy some checks for somebody that obviously I just didn't know, had never even met. So, basically, I had to more or less pretend that I knew them." (R.T. 342, 455)

reporting requirement[2] and to carry second deeds of trust to make it look like the properties were fully encumbered so that no one would be interested in seizing the property.[3] (R.T. 246) According to Mr. Randolph, petitioner told him that the purchasers of the houses were gamblers and the money was proceeds from gambling. (R.T. 247) "The only thing I was interested in at that point was the three thousand dollars,"[4] said Mr. Randolph. (R.T. 248)

A day or two later, Mr. Randolph received a call from petitioner who told him that it was all set up[5] and they agreed to meet in at the Rockridge Shopping Center in Oakland. On March 17, 1987, Mr. Randolph picked up petitioner at his home and took him to the shopping

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[2] Mr. Randolph admitted that he told Agent Fletcher that he purchased the checks because Mr. Jackson and Mr. Powers did not want to take the time to do so. (R.T. 410)

[3] Mr. Randolph admitted that in his July 9, 1987 statement he told Agent Fletcher that he and appellant had never discussed the deeds of trust. (R.T. 341)

[4] Mr. Randolph admitted that, on two occasions, he told Agent Fletcher of the Internal Revenue Service that he had received no fee for purchasing the checks because he was going to get money for doing work on the houses purchased by Mr. Jackson and Mr. Powers. (R.T. 317, 340)

[5] Mr. Randolph admitted that he told Agent Fletcher that appellant did not give him any instructions. (R.T. 328)

center in his truck[6]. (R.T. 249) Mr. Powers and Mr. Jackson, the purchasers of the houses in question, arrived in a white Blazer. Mr. Randolph testified that this was the first time he had met Mr. Powers and Mr. Jackson[7]. (R.T. 413) According to Mr. Randolph, Mr. Powers and Mr. Jackson had a large amount of cash in a shoe box. They all went to 20th Street and Broadway, petitioner in his car and Mr. Powers and Mr. Jackson in their car.[8] (R.T. 251)

When they got there, Mr. Jackson gave him a bundle of money, $9,000.00, which he removed from a shoe box,[9] to purchase a cashier's check made payable to Founder's Title Company. Mr. Randolph purchased the check, gave it to Mr. Powers, who gave him another bundle of cash and followed the same procedure at three

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[6] Mr. Randolph admitted that he told Agent Fletcher that he had met appellant at the shopping center. (R.T. 352)

[7] Mr. Randolph admitted that he told Agent Fletcher in his July 9, 1987 statement, that he had met Mr. Powers and Mr. Randolph on several occasions at appellant's house, prior to March 17, 1987. (R.T. 393)

[8] Mr. Randolph admitted that he told Agent Fletcher that they had all gone in one car. (R.T. 354)

[9] Mr. Randolph admitted that he didn't tell Agent Fletcher about the shoebox. (R.T. 355)

additional banks.[10] After the fourth transaction was complete, it was after 4:00 p.m. and Mr. Randolph and Mr. Powers agreed to meet the next day to purchase two more checks. (R.T. 253-257)

After the last check was purchased that day, Mr. Randolph received $3,000.00 in cash from Mr. Powers. According to Mr. Randolph, he turned over $1,000.00 of that amount to petitioner. Mr. Randolph then took petitioner back to his residence. (R.T. 260)

The next day, Mr. Powers picked up Mr. Randolph during the lunch hour and he purchased two additional checks. (R.T. 262) According to Mr. Randolph, about a week later, petitioner called up Mr. Randolph and told him that he had some papers for him to sign. They met and he signed the deeds of trust. (R.T. 264)

Mr. Randolph testified that he was not required by the banks to fill out any Currency Transaction Reports when he purchased the checks. Despite the fact that the "structuring" law, 31 U.S.C. § 5324, went into effect on January 27, 1987, Mr. Randolph told the jury that he

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[10] Mr. Randolph admitted that he told Agent Fletcher that he had received $53,000 in cash on that date and when the banks were closed after he purchased four checks, he returned $17,000 to Mr. Powers and Jackson. (R.T. 336)

known that for, "a couple of years" prior to the events of this case at the time that, "[i]t was a violation" to purchase multiple checks of less than $10,000.00.[11] (R.T. 253)

Nathan Fletcher, a special agent with the Internal Revenue Service, told the jury that in the spring of 1987, he began to investigate the purchase of certain real estate in Solano County by going to the Solano County Recorder's Office. In the course of his investigation, he determined that both Mr. Powers and Mr. Jackson had purchased houses, one in Susuin City and one in Fairfield, with no money down. (R.T. 501, 502)

He next went to Founder's Title Company and learned that the down payments for the houses were in the form of cashier's checks, purchased from different banks. Suspicious that someone was structuring a currency transaction to avoid the reporting requirement, he went to the banks were the checks were purchased and determined that they were purchased with cash and that no CTR's (Currency Transaction Reports) had been

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[11] Mr. Randolph admitted that when he spoke to Agent Fletcher on June 30, 1987, Mr. Randolph told him that he, "did not do anything wrong." (R.T. 320) He also admitted telling Agent Fletcher that he did not know it was a violation of the law to go to six different banks to avoid the bank's reporting requirement. (R.T. 328)

filed in connection with the purchase of those checks. (R.T. 503-509)

On July 29, 1987, Agent Fletcher interviewed petitioner for about one hour. (R.T. 510) Petitioner told him that his only involvement with the transactions was that: (1) he referred Powers and Jackson to Diane Langston and that he got a finder's fee for the referral and (2) he referred them to Mr. Randolph for assistance in financing. Petitioner also told him that Mr. Randolph had been pressuring him for the previous two months to refer loan customers to him. (R.T. 512) Petitioner told him that he was present when Mr. Randolph received the three thousand dollars from Mr. Jackson and Mr. Powers, but that it was his understanding that the money was for points on the loan and that the thousand dollars he received from Mr. Randolph was his referral fee. (R.T. 514)

I

Petitioner was Denied Due Process of Law and Equal Protection of the Law When the Trial Court Failed to Instruct the Jury that A Violation of 31 U.S.C. §5324, "Willfully" Structuring a Monetary Transaction Required Proof Beyond a Reasonable Doubt that Petitioner Voluntarily and Intentionally Violated a Known Legal Duty per this Court's Decision in *Cheek v. United States* (1991) __U.S.__, 111 S.Ct. 604

A.

Statement of Facts

Appellant was charged with conspiring to violate 31 U.S.C. §§5313[12] and 31 U.S.C. §5324(1) and (3)[13] as well

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[12] Section 5313 provides, in pertinent part, that:

> "(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made."

[13] Section 5324 provides that:

as the substantive crime of structuring a monetary transaction. (31 U.S.C. §5324(3).) Section 5324 does not, by its language, create a penalty for structuring a monetary transaction; neither does §5313 for violating its reporting requirements. Criminal penalties violations of both §5313 and §5324 are determined only by reference to §5322 which provides, in pertinent part, that:

> "(a) A person *willfully* violating *this subchapter* or a regulation prescribed under this subchapter...shall be fined not more than $250,000, or imprisonment (sic) not more than five years, or both." (emphasis added)

At appellant's trial, the jury was instructed that an act is done "willfully" if it is,

> "done voluntarily and intentionally and with the specific intent to do something that the law forbids; that is to say, with

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"No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction–

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."

bad purpose either to disobey or disregard the law." (Instruction 12 A)

B.

This Court's Decision in *Cheek v. United States* 1991) __U.S.__, 111 S.Ct. 604 Mandates that a Jury Must be Instructed that "Willfully" as Used in 31 U.S.C. §5322 Means a "voluntary, intentional violation of a known legal duty."

Generally speaking, as used in criminal statutes, "willful" means,

> "no more than that the person charged with the duty knows what he is doing. It does not mean that in addition, he must suppose that the is breaking the law." (*American Surety Co. v. Sullivan* (2nd Cir. 1925) 7 F.2d 605, 606.)

In tax cases, however, "willful" means something more than merely doing the prohibited act intentionally; in order to convict a person of a violation of the tax laws, the prosecution must prove that the defendant committed a, "voluntary, intentional violation of a known legal duty." (*United States v. Bishop* (1973) 412 U. S. 346, 360, *Cheek v. United States, supra, United States v. Pomonio* (1976) 429 U.S. 10, *United States v. Murdock* (1933) 290 U.S. 389.)

The reasoning for this distinction was explained by this court in *Murdock, supra.*

> "Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should be come a criminal by his mere failure to measure up to the prescribed standard of conduct." (*Id*, 290 U.S. at 396.)

Under the statutory scheme regulating the reporting of currency transactions, the various reporting requirements are set forth in separate sections of Subchapter 2 (§§5311-5326), Chapter 53, Title 31, United States Code. The *uniform* criminal penalties for violating any one of those sections[14] are set forth in §5322. Thus the penalties for violating §5313 (domestic coins and currency transactions), §5314 (foreign financial agency transactions), §5316 (reports on exporting and importing monetary instruments) §5324 (structuring transactions to evade reporting requirements), §5325 (identification required to purchase certain monetary instruments), and §5326 (records of certain domestic coin and currency transactions) are all contained in §5322. Section 5322(a) provides criminal penalties only for, "*willfully* violating

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[14] With the exception of §5315.

this subchapter or a regulation under the subchapter." (emphasis added)

In analyzing the mental state required for a violation of §5313 and §5316, the circuits are unanimous requiring proof of "voluntary, intentional violation of a known legal duty." (*United States v. Bank of New England* (1st Cir. 1987) 821 F.2d 844, *United States v. Eisenstein* (11th Cir. 1984) 731 F.2d 1540; *United States v. Granda* (5th Cir. 1978) 565 F.2d 922, 926; *United States v. Salinas-Garza* (5th Cir. 1986) 803 F.2d 834, 839, United *States v. Chen, supra.*) The Ninth Circuit has held that the use of the word "willfully" in §5322(a) modifies the word "violat[es]" in the currency reporting requirements of the subchapter so that,

> "the term 'willfully' in section 5322(a) makes knowledge of the reporting requirement an additional element that the government must prove in order to secure a criminal conviction." (*United States v. $122,043.00 in U.S. Currency* (9th Cir. 1986) 792 F.2d 1470, 1474, *United States v. Chen* (9th Cir. 1979) 605 F.2d 433, 434.)

Nevertheless, in August of 1990, in *United States v. Hoyland* (9th Cir. 1990) 914 F.2d 1125, the Ninth Circuit held that the same word "willfully" as used in §5322

meant something different when that *same word* in the *same statute* was applied to prosecutions under 31 U.S.C. §5324. The court held that in "structuring" prosecutions, the government need not establish that the defendant was aware that his conduct violated the law.

> "Unlike tax and section 5316 currency violations, structuring is not he kind of activity that an ordinary person would engage in innocently. Only the person who has a deliberate intention to frustrate the reporting by the banks is guilty of the offense...intent to do the act will suffice."

Following that decision, in January of 1991, *Cheek v. United States, supra*, this Court reaffirmed the special definition of "willful" in tax cases. This Court held that a defendant who believed in that "wages" were not "income" for the purposes of income tax laws could not be found guilty of a "willful" violation of the tax laws unless the government proved that the defendant was, in fact, aware that wages were considered income by law.

> "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." (*Id.*, 111 S.Ct. at 610-611)

There can be no doubt that appellant's case is a criminal tax case. The "Declaration of Purpose" of Subchapter 2 (§5311) declares,

> "It is the purpose of this subchapter... to require certain reports or records where they have a high degree of usefulness in criminal, *tax*, or regulatory investigations or proceedings." (emphasis added)

Nevertheless, in petitioner's case, the Ninth Circuit affirmed petitioner's conviction based upon its prior decision in *Hoyland, supra.*

Given that the circuits have uniformly interpreted "willfully" as used §5322(a), to require proof of a "voluntary, intentional violation of a known legal duty" when that word is applied to §§5313 and 5316, the question then becomes, does "willfully," mean something different depending on whether the defendant is charged with "*willfully* violating" §5313 or with "*willfully* violating" §5324, both of which are in the same subchapter? While it requires no citation of authority to assert that the word "willfully" can mean different things when used in *different* contexts, when used not only in the *same* context - a criminal tax prosecution- but in the same subchapter, in the absence of evidence of specific

legislative intent to ascribe more than one meaning to that word, "willfully" means, "a voluntary, intentional violation of a known legal duty." (*United States v. Bishop, supra.*)

In *Bishop*, a criminal tax prosecution, this Court was confronted with a similar contention that the word "willfully" meant two different things, depending on whether the violation charged was a felony or a misdemeanor. This Court summarily rejected that proposition that the word "willfully" could have two different meanings in criminal tax prosecutions. This Court held that it:

> "has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty.
>
> *****
>
> "This longstanding interpretation of the purpose of the recurring word 'willfully' promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law....The Court's consistent interpretation of the word 'willful' to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." (*Id.* 412 U.S. at 359-361.)

Moreover, in *Bishop*, this Court held that the fact that a statute such as §5324 provides a separate *mens rea* element, in addition to "willfulness" requirement in the penalty section, indicates that the requirement of willfulness is separate and distinct from the other elements of the *mens rea* of the crime.

> "[t]he actor's mental state is described both by the requirement that acts be done 'willfully' and by the designation of certain express elements of the offenses....Although the described states of mind might be included in the normal meaning of the word, "willfully," the presence of both an express designation and the simultaneous requirement that a violation be committed 'willfully' is strong evidence that Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula." (*Id.* 412 U.S. at 359, 360.)

It is a settled maxim of statutory construction that, "where the same terms are used in different sections of a statute, they receive the same meaning." (*Firestone v. Howerton* (9th Cir. 1982) 671 F.2d 317, 320, fn. 6; *S&M Investment v. Tahoe Regional Planning Agency* (9th Cir. 1990) 911 F.2d 324, 328)

If the same terms used *more than once* in the same statute have the same meaning, it follows, *ipso facto*,

where the same term is used *only once* in a statute prescribing penalties for other portions of the same subchapter, not only maxims of statutory construction but logic requires that that solitary word must have the same meaning wherever it is used.

There is no basis for concluding that Congress intended that the word "willfully," used in *single* penalty section, to mean two different things, depending on the currency violation to which it was applied.

> "While courts are no longer confined to the language [of the statute], they still are confined by it. Violence must not be done to the words chosen by the legislature." (Frankfurter, J., *Some Reflections on the Reading of Statutes*, 47 Co. L. Rev. 527, 543.)

Moreover, the Ninth Circuit's interpretation of §5322, 5324 would render portions of those statutes as surplusage. Without reference to the "willful" language of §5322, §5324, by its *own* words, *independently* prohibits structuring of monetary transactions, "for the purpose of evading the reporting requirements of section 5313(a)." In *Hoyland, supra*, the Ninth Circuit interpreted "willfully" in §5322, to mean the same thing, namely, "the intent to prevent reporting." If the Ninth Circuit was correct, then the word "willfully," as it appears in §5322, would be mere

surplusage, because, "the intent to prevent reporting" is already an element of §5324. Under the *Hoyland* court's interpretation, §5324, as read in the light of §5322, would read,

> "No person shall [structure a monetary transaction] for the purpose of evading the reporting requirements of section 5313(a)...A person...violating this subchapter [with the intent to evade the reporting requirement]... shall be fined not more than $250,000, or imprisonment (sic) no more than five years, or both."

Not only is this construction redundant, it reduces the "willfully" requirement of §5322 to mere surplusage. Statutes are presumed not to contain surplusage and are interpreted to avoid so rendering the words used therein. "Congress is not to be presumed to have used words for no purpose." (*Platt v. Union Pacific R.R.* (1878) 99 U.S. 48, 58; *Pacific Gas and Electric v. Securities and Exchange Commission* (9th Cir. 1942) 127 F.2d 378, 382, "[A] legislative body is presumed to have used no superfluous words in a statute...and the rule [is] that 'effect shall be given to every clause and part of a statute' (*Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208)."

Similarly, in a structuring prosecution, the fact that Congress required that the act performed be done with, "the purpose of evading the reporting requirements of §5313(a)" and that the requirement that the act be done "willfully" means something in addition to intent to evade the reporting requirement and is, "strong evidence that Congress used the word 'willfully' to describe a constant rather than a variable in the tax penalty formula." (*Ibid.*)

This country has historically protected individual privacy from government intrusion. If a municipality passed an ordinance requiring a permit for constructing a fence six feet or higher, a person seeking to avoid the inconvenience and hassle of getting a permit by building a fence that is 5'10" high would not ordinarily be considered a criminal for "structuring" his fence to avoid the permit requirement. There is nothing *per se* illegal about cash transactions and it does not follow, *ipso facto*, that a cash transaction with tax consequences will necessarily not be reported. Arranging cash transactions to avoid a report to the government would strike most people as acceptable or, at least, non-criminal conduct.

It is anomalous indeed to require proof that a defendant knew of a reporting requirement to sustain a

criminal conviction under §5313, but to dispense with that requirement when the charge is engaging in currency transactions that do not, on their face, trigger the reporting requirement.

Law abiding citizens often structure their affairs to avoid government paperwork. Corporations are constantly structuring their financial affairs to minimize their exposure to tax liability. Inter vivos trusts are created, minors become majority stockholders in large corporations, headquarters are moved to remote locations with more favorable tax laws -- an infinite variety of legal fictions have been created to fit the letter of the tax code to minimize taxes. It is a staple of tax law that the same property can be taxed at widely varying rates, depending on how the title, domicile and, corporate character of the entity are structured.

Although it is assumed that the currency laws in question were designed with the purpose of detecting criminal activity, that does not justify abandoning a uniform construction of the word "willful." *Bishop, supra.* Especially in our complicated tax laws, it is altogether reasonable to assume that that which is not expressly prohibited is permitted. Thus mere knowledge that

reporting transactions over $10,000.00 is required in no way gives the average citizen knowledge or notice that arranging ones' financial affairs to avoid that reporting requirement is also prohibited. This was especially true in this case, where the structuring statute went into effect a few weeks before the transactions occurred.

Finally, this Court's decision in *Cheek* was both sweeping and plenary. This Court stated in no uncertain terms that:

> "Willfulness, as construed by our prior decisions *in criminal tax cases*, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." (*Id.*, 111 S.Ct. at 610) (emphasis added)

There is nothing in the Court's opinion to indicate that the holding applied to some, but not all, "criminal tax cases."[15] Indeed, when read with this Court's prior decision in *Bishop, supra*, the conclusion is inescapable that in the criminal tax laws of this country, there is only one meaning to the word willfully - "a voluntary, intentional violation of a known legal duty."

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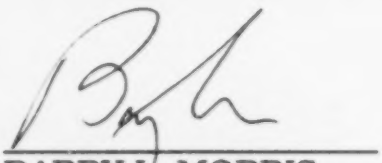
[15] Indeed, Justice Scalia, in his concurrence, indicated strongly that the opinion did not go far enough and would have allowed a criminal tax defendant to argue good faith belief in the unconstitutionality of the tax laws as a defense.

C.

Conclusion

The Ninth Circuit erred in refusing to apply this Court's decision in *Cheek, supra*, to the structuring law under which petitioner was convicted. Petitioner's conviction should be reversed and remanded for a new trial.

Dated: November 12, 1992



BARRY J. MORRIS
Attorney for Petitioner
RAY CARLISLE

PROOF OF SERVICE BY MAIL

Petition for Certiorari

I, Barry L. Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1401 Lakeside Dr. Oakland, California, 94612; and I am not a party to the within action. On the date shown below, I deposited a true copy of the above-entitled document(s) in the mail in the City of Oakland by placing said document(s) in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Eric Swenson, Esq.
Assistant United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

Clerk, Criminal Division
United States District Court
450 Golden Gate Avenue
San Francisco, California 94102

United States Court of Appeals
Ninth Circuit
P.O. Box 547
San Francisco, California 94101-0547

Solicitor General
Department of Justice
10th St. and Constitution Ave., N.W.
Washington, D.C. 20530

Executed on December 10, 1992 at Oakland, California

I declare under penalty of perjury that the foregoing is true and correct.